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NO._____

In The
Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM THIBADEAU
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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QUESTION PRESENTED

1. Whether the Federal Odometer Statutes, 15 U.S.C. Sections 1984 and 1986, are unconstitutional for the reason that they exceed Congress' power under the Commerce Clause to criminalize a surely intrastate activity absent a clear legislative record that such intrastate activity affects or impacts on interstate commerce?

TABLE OF CONTENTS

	Page
Table of Cases	ii
Opinions Below	v
Jurisdiction	v
Constitutional Provisions Involved	v
Statement of the Case	1
Reasons For Granting The Writ	
I. CONGRESS DOES NOT HAVE THE POWER UNDER THE COMMERCE CLAUSE TO CRIMINALIZE THE INTRASTATE TAMPERING OF ODOMETERS ABSENT A CLEAR LEGISLATIVE RECORD THAT SUCH INTRASTATE TAMPERING AFFECTS OR IMPACTS ON INTERSTATE COMMERCE	2
CONCLUSION	29
APPENDIX:	
(1) OPINION OF THE UNITED STATES DISTRICT COURT (HON. JOSE CABRANES) dated October 7, 1980.	1A
(2) OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT (May 15, 1981)	4A

TABLE OF CASES

	Page
Barrett v. United States, 423 U.S. 212 (1976)	8
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)	4,5, 10,3A
Katzenback v. McClung, 379 U.S. 294 (1964)	4,2A
Mandina v. United States, 472 F.2d 1110 (8 Cir. 1973), cert. denied, 412 U.S. 907 (1973)	8
Maryland v. Wirtz, 392 U.S. 183 (1968)	4
Perez v. United States, 402 U.S. 146 (1971)	2,4,6 10-12,24
Rewis v. United States, 401 U.S. 808 (1971)	26
Scarborough v. United States, 431 U.S. 563 (1977)	5,7,8
United States v. Archer, 486 F.2d 670 (2 Cir. 1973)	25
United States v. Bass, 404 U.S. 336 (1971)	5-7 24,27
United States v. Burroughs, 564 F.2d 1111 (4 Cir. 1977)	24

TABLE OF CASES (continued)

Page

United States v. Camacho, 528 F.2d 464 (9 Cir. 1976) cert. denied, 425 U.S. 995 (1976)..... 9

United States v. Darby, 312 U.S. 100 (1941)..... 4,23

United States v. Lopez, 459 F.2d 949 (5 Cir. 1972).....22,23

United States v. Mennuti et al, Slip. Op. 80-1174 (2 Cir. January 9,1981).....26,27

United States v. Sacco, 491 F.2d 995 (9 Cir. 1974)..... 10

United States v. Scales, 464 F.2d 371 (6 Cir. 1972)..... 23

United States v. Wrightwood Dairy, 315 U.S. 110 (1942)..... 4

Wickard v. Filburn, 317 U.S. 111 (1942)..... 4

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 15, 1981.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is unreported but is reprinted in Petitioner's Appendix, along with the opinion of the United States District Court for the District of Connecticut (Hon. José Cabranes) dated October 7, 1980.

JURISDICTION

The decision of the Second Circuit Court of Appeals was rendered on May 15, 1981. This petition for a writ of certiorari was filed within sixty (60) days of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Commerce Clause (Article 1, §8)

The Congress shall have power...to regulate commerce with foreign nations, and among the several States and with the Indian Tribes.

STATEMENT OF THE CASE

On April 25, 1980, the Defendant, William Thibadeau, his son, Patrick Thibadeau and Norman Harris were charged in a two-count indictment with violating the Federal Odometer Statute, 15 U.S.C. Sec. 1984, and with conspiring to violate the Statute, 15 U.S.C. Sec. 1986.
Responding to Defendants' Motion to Dismiss on the grounds of duplicity, the Government moved to dismiss the indictment without prejudice, which motion was granted, and on July 29, 1980, the Government filed a seven-count information.
Each of the three co-defendants was charged with two substantive violations of the odometer statute and with conspiring to violate the statute.

The Defendants moved to dismiss the information in the trial court on the ground that Title 15, Sections 1984 and 1986 are unconstitutional for the reason that no federal jurisdictional basis exists for criminalizing intrastate odometer tampering.

The Hon. José A. Cabranes denied the Motion to Dismiss on the foregoing ground in a memorandum of decision filed on October 7, 1980. On December 15, 1980, Defendant William Thibadeau entered a plea of guilty to count one of the information. In so pleading the Defendant requested permission to appeal the issues raised by his motion to dismiss to the Court of Appeals for the Second Circuit and to file a petition for a writ of certiorari to this Court. The Government consented to the reservation of appeal and Judge Cabranes specifically granted Defendant's request to reserve his right of appeal.

On January 22, 1981, Judge Cabranes sentenced the Defendant William Thibadeau to the custody of the Attorney General for one year, execution suspended, probation for a period of three years. As a condition of probation the Court imposed a twenty thousand ($20,000.00) dollar fine.

On May 15, 1981 the Court of Appeals for the Second Circuit affirmed the conviction and rejected the constitutional challenge to 15 U.S.C. Secs. 1984 and 1986 in a brief opinion.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Second Circuit concerning the constitutionality of 15 U.S.C. §§1984 and 1986 is probably not in accord with an applicable decision of this Court, to wit: Perez v. United States, 402 U.S. 146 (1971).

I.

CONGRESS DOES NOT HAVE THE POWER UNDER THE COMMERCE CLAUSE TO CRIMINALIZE THE INTRASTATE TAMPERING OF ODOMETERS ABSENT A CLEAR LEGISLATIVE RECORD THAT SUCH INTRASTATE TAMPERING AFFECTS OR IMPACTS ON INTERSTATE COMMERCE.

On July 29, 1980, the Government filed a seven-count information charging William Thibadeau, Norman Harris and Patrick Thibadeau with substantive violations of the Federal Odometer Statute, 15 U.S.C. §1984, and conspiracy, 15 U.S.C. §1986. Sections 1984 and 1986 provide as follows:

No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (1984)

No person shall conspire with any other person to violate Sections 1983, 1984, 1985, 1987, or 1988 of this title. (1986)

These sections are part of Subchapter IV ("Odometer Requirements") of Chapter 46, "Motor Vehicle Information and Cost Savings," 15 U.S.C. §1901, et seq. Prior to July 14, 1976, violations of 15 U.S.C. §§1984 and 1986 carried no criminal penalties. On that date, however, Congress enacted Section 1990c which provides a penalty of not more than one year in jail and/or a fine of $50,000.00 for a violation of §1984 or §1986.

As is apparent from a reading of 15 U.S.C. §§1984 and 1986, both sections purport to criminalize purely intrastate activities. The Government is not required to prove any nexus or impact upon interstate commerce in order to sustain its burden.

Since 1973 it has been a crime under Connecticut State law for any person or agent to "remove, turn back or change" the reading on an odometer. Conn. Gen. Stat. §14-106B(b)(d). It is Defendant's position that by its amendment on July 14, 1976, criminalizing the Federal Odometer statutes, Congress has intruded into a purely state matter over which it has no jurisdiction. We therefore ask the Court to find §§1984 and 1986 unconstitutional.

There is no dispute that Congress has the power to regulate purely intrastate activities should Congress have a rational basis to find that those activities exert a substantial effect on interstate commerce. United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Perez v. United States, 402 U.S. 146 (1971). In Wickard, supra, the Court held that even a small quantity of wheat grown and consumed locally could be reached by Congress since the grower satisfied his own needs rather than purchasing the product in the national market. The Court held in Darby, supra, that it is within the power of Congress to deem that an entire "class of activities" affected interstate commerce and therefore Congress could regulate both intrastate and interstate incidences of those activities. If Congress has made a rational determination that the entire class of activities is within the reach of its commerce power, there is no need for inquiry as to whether individual incidences, whether interstate or intrastate, affect commerce. Katzenbach v. McClung, supra; Perez v. United States, supra. And if the Court finds that Congress had a rational basis for regulation of the entire class of activities, the Court cannot "excise, as trivial, individual instances of the class." Maryland v. Wirtz, 392 U.S. 183, 193 (1968).

The doctrine that Congress must have a rational basis for its finding that it is necessary to reach intrastate matters and that it must seek appropriate means was articulated by Chief Justice Stone in United States v. Wrightwood Dairy, 315 U.S. 110, (1942):

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate Interstate commerce...Id. at 119.

In Heart of Atlanta Motel, supra, a two-tier test to scrutinize Congress' exercise of its commerce power over a class of activities was formulated. The two questions posed by the Court were (1) did Congress have a rational basis for finding that the activity affected commerce; and (2) if it had such a basis, "whether the means it selected to eliminate that evil are reasonable and appropriate." Id. at 258-259.

The Court has recognized that in matters of criminal activity, criminal jurisdiction is normally within the domain of the State police power and that Congress has "traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This Congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines." United States v. Bass, 404 U.S. 336, 349 (1971). In order for Congress to reach purely intrastate criminal activity, it must make a clear statement of its purpose. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Bass,

supra, at 349, Scarborough v. United States, 431 U.S. 563, 568 (1977).

The statute challenged in Perez v. United States, supra, was Title II of the Consumer Credit Protection Act (18 U.S. §891, et seq.) which proscribed all extortionate credit transactions which the Court characterized as "loan sharking." The issue presented to the Court was whether Congress could reach purely intrastate incidences of such activities without requiring proof that such activities affected commerce. The Court, after scrutinizing the legislative history, found that Congress had made a thorough investigation into interstate organized crime and had made a determination that loan sharking was intrinsically and directly linked to the interstate enterprise of organized crime, that loan sharking was the second largest source of revenue for organized crime, and that through loan sharking the organized "underworld" took control of legitimate businesses. Therefore it was rational for Congress to find that "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." Section 201(a), Title II, Consumer Credit Protection Act.

The issue presented by Bass, supra, differed in that the statute involved, §1202(a) of the Omnibus Crime Control and Safe Streets Act [18 U.S.C. App. §1202(a)], contained a statutory requirement that the proscribed activity have a nexus to interstate or foreign commerce. That statute provided criminal sanctions for five classes of persons who receive, possess, or transport "in commerce or affecting commerce . . .

any firearm." The Government maintained that it was not required to show a nexus to commerce in individual cases involving possession or receipt of a firearm by a convicted felon. The Court rejected that claim, stating that the legislative history did not support the contention that Congress intended to reach mere possession or receipt without a showing of a relationship to commerce. Absent a clear direction from Congress the Court refused to accept broad reading of a statute that affected the sensitive area of federal-state balance:

> ...In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, §1202(a) dramatically intrudes upon traditional state criminal jurisdiction. As in Lewis, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret §1202(a) to reach the "mere possession" of firearms. Id. at 350.

The Court considered the Bass statute once again in Scarborough v. United States, supra. Although Scarborough held that the Government's burden of showing a nexus to commerce was minimal and stated that the nexus need not be "contemporaneous" with possession, it re-articulated its position

that the legislative history and statutory language did not support the contention that no nexus was required:

> It seems apparent from the foregoing [legislative history] that the purpose of Title VII was to proscribe mere possession but that there was some concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in Bass to find the clear intent necessary to conclude that Congress meant to dispense with a nexus requirement... Id. at 575. [Emphasis added.]

The Court has discussed other criminal statutes for which Congress has relied on its commerce power. When considering the Gun Control Act of 1968 (18 U.S.C. §922) in Barrett v. United States, 423 U.S. 212 (1976), which proscribed receipt of "any firearm or ammunition which has been shipped or transported in interstate commerce" by certain classes of persons, including convicted felons, the Court relied on the legislative history and language of the statute, and reached a conclusion similar to that in Scarborough, supra; that the legislative history and language of the statute showed that Congress intended to reach intrastate activity and that the statute required a nexus to commerce, albeit minimal, to support a conviction.

Section 922(d)(1) of the Gun Control Act was challenged in Mandina v. United States, 472 F.2d 1110 (8 Cir. 1973), cert. denied 412 U.S. 907 (1973). Mandina claimed that application of federal licensing requirements to dealers whose business was exclusively intrastate exceeded Congress'

power under the Commerce Clause. The Court found that Congress had a rational basis for requiring licenses of all dealers, citing Congress' response to "widespread National concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate," and that only through licensing of all importers, dealers and manufacturers would it be possible to control firearms traffic. Id. at 1113. Further, the Court held that reasonable, appropriate and logical means to prevent interstate trafficking in firearms for illegal purposes is to control its source through licensing. Id. at 1114. A similar rationale for the prohibition of sales of firearms to non-residents [18 U.S.C. §922(b)(3)] was found by the Court in United States v. Camacho, 528 F.2d 464 (9 Cir. 1976), cert. denied 425 U.S. 995 (1976).

It is apparent that there are two types of criminal statutes emanating from Congress' power to reach an entire class of activities whether interstate or intrastate: (1) those that contain a statutory requirement that a nexus to foreign or interstate commerce be shown; and (2) those for which no nexus is required. The statutes subject of this discussion (15 U.S.C. §§1984 and 1986) are of the latter type as there is no language requiring a nexus to commerce.

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (1984)

> No person shall conspire with any other person to violate Sections 1983, 1984, 1985, 1987 or 1988 of this title. (1986)

Section 1990c, added in 1976, provides criminal penalties for violations of §§1984 and 1986.

For those statutes that broadly reach intrastate criminal activity, there must be a rational basis for Congress' determination that in order to serve a legitimate federal concern, intrastate as well as interstate regulation is necessary. For instance, the Perez statute (18 U.S.C. §891 et seq.) proscribing all extortionate credit transactions, whether interstate or local, was found to be a justifiable exercise of the commerce power because Congress made an informed determination, after extensive hearings and investigations, that local loansharking provided a foundation for and was directly tied into organized, interstate crime organizations. A similar conclusion was reached by the 9th Circuit Court of Appeals in United States v. Sacco, 491 F.2d 995 (9 Cir. 1974) with respect to local gambling operations in violation of 18 U.S.C. §1955 (Part C, Title VIII of the Organized Crime Control Act of 1970). Applying the two-tier rational basis test enunciated in Heart of Atlanta Motel, supra, and relying on Perez, supra, the Court held that it was rational for Congress to find that the local gambling operations defined by the statute had an effect on commerce in that they were a great source of revenue for organized crime. The Congressional findings as to the extent of the effect of the proscribed class of activities on commerce were explicit and detailed. Quoting from

the Senate Report [No. 91-617, 91st Congress, 1st Sess. 16 (1969)], the Court related:

> The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof; (2) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws. Id. at 999.

The Court continued by summarizing other facts developed in the Senate investigation:

> It was also found that organized crime had developed complex channels through which ostensibly local gambling operations sent their revenue to central coffers. The illicit operations were seen to distort the production of goods for commerce and the flow of goods in interstate commerce. Id. at 1000.

On the basis of the legislative investigation and findings, the Court concluded that the "means chosen by Congress were reasonable and appropriate. The goal was to reach large-scale operations that were so continuous and so substantial as to be

of national concern." Id. at 1001.

By contrast, the legislative history of 15 U.S.C. §§1984 and 1986, and the criminal penalties imposed by §1990c, is meagre. The Congressional findings and purpose set forth in §1981 contain passing references to the self-evident fact that motor vehicles move in the "current of commerce":

> The Congress hereby finds that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this subchapter to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered reset odometers. [Emphasis added.]

The majority of discussion on the floor of the Senate when the "Motor Vehicle Information and Cost Savings Act" was passed in 1971 was concerned with Titles I through III of the Act. The few remarks directed to the odometer section (Title IV) at that time carrying only civil penalties, illustrate that the thrust of the bill was

concerned with consumer safety and savings* and that doubt was raised as to the odometer regulation as evidenced by the discussion on that provision between Senators Curtis and Griffin:

> MR. CURTIS: They have a provision here to protect the consumer from having the odometer reading--I thought it was speedometer, but it is odometer --changed, so it cannot be disconnected to defraud purchasers. That would be $2.50 a car because if there are 10 million cars sold, there will be that many traded in. I do not know whether they could inspect them for $2.50 or not.
>
> MR. GRIFFIN: I am going to have to come to the defense of my senior colleague and say that the $25 million to which I referred would deal only with Title I. The provision about the speedometers is in another title. There are four titles to the bill. My pending argument deals only with title I, which requires the promulgation of these so-called property law standards.
>
> MR. CURTIS: I understand that.
>
> MR. GRIFFIN: How much it would cost to enforce that particular provision, I cannot tell the Senator. I do not know.

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*The stated purpose of S. 976 was... "to promote competition among motor vehicle manufacturers in the design and production of safe motor vehicles having greater resistance to damage and for other purposes." 117 Cong. Rec. 39035 (1971)

MR. CURTIS: But they have provided $25 million to enforce all four sections?

MR. GRIFFIN: I am told by the staff that the $25 million relates only to title I, $2 million with respect to title II; $50 million with respect to title III; and about a half a million dollars with respect to the title the Senator from Nebraska is referring to.

117 Cong. Rec. 39037-8 (1971)

As can be seen from the foregoing colloquy, there was even misunderstanding as to whether the statute dealt with speedometers or odometers. In addition, Senator Curtis raised the question as to the relation of odometer tampering to vehicle safety.

MR. CURTIS: Is there any relation between protecting consumers from having their speedometers [sic] changed and safety?

MR. GRIFFIN: Not a bit.

MR. CURTIS: I would think it would be quite remote.

(Cong. Rec. at 39038)

Senator Curtis then went on to raise doubts about the extension of federal jurisdiction into this area:

It seems to me one of the issues the Congress must decide is whether or not we are going to take over and run from Washington every human endeavor. I represent a rural State. It seems that one of my biggest jobs is fighting

the Federal Government to keep it from closing up all the rural communities. It does not make much difference what the business activity is, the Federal Government is harassing it and policing it and inspecting it...

I want to do what is properly within the jurisdiction of the Federal Government to do in the field of safety, but I know that I do not want to turn the policing of every transaction and every act in every type of business and the design of every vehicle over to the Federal Government.

Con. Rec. at 39038

The Senate Report (92-413) and House Conference Report (92-1476) submitted in support of the Motor Vehicle Information and Cost Savings Act in 1972 does not provide much more support for the necessity of such a broad odometer statute. Again, the bulk of the legislative history as reported in U.S. Code Congressional and Administrative News, 1972, p. 3960 et seq. deals with other aspects of the Act.

In the section entitled "Background and Need" the Senate Report stated with respect to Title IV:

Finally, there is a need to adopt a national policy against odometer tampering. Some 17 states persently have legislation prohibiting persons from tampering with odometers. A national policy against such fraudulent practices is needed.

1972 U.S. Code Cong. and Admin. News 3964.

In support of the need for a national policy, the report stated as follows:

> Presently some seventeen States have enacted legislation to curb this practice. However, States without such legislation have found this practice on the increase, especially when a neighboring State has an odometer law. Odometers are turned back in States without odometer laws and then cars are marketed at inflated values in States with such laws. Thus, State odometer laws are easily circumvented and people in a State with such a law suffer because of this practice. By prohibiting the disconnecting or turning back of odometers , title IV would establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses. Id. at 3962.

No more evidence was offered in support of the title when it was first enacted in 1972.

In 1976, amendments to the 1972 act were proposed and passed, including an amendment to Title IV to provide for criminal penalties for violations of the odometer-tampering sections. In support of the criminal sanctions, Senate Report 94-155 stated as follows:

> While Title IV established a comprehensive law prohibiting odometer tampering, it provided for enforcement only through private civil actions or injunctive actions. In over two years, only one injunctive enforcement action has been brought by the Attorney General and few consumers have utilized

the private civil action provisions. In testimony before the Senate Commerce Committee, officials of the Department of Transportation indicated that without additional enforcement powers and sanctions, it would be virtually impossible to put a halt to the trafficking of vehicles in Interstate commerce which had been subject to odometer tampering. Both the Department of Transportation and the Attorney General supported additional powers and sanctions.

1976 U.S. Code Cong. and Admin. News, 1723.

Hearings were held before the House Committee on Interstate and Foreign Commerce on July 28 and 30, 1975.* At that time, testimony was heard from James B. Gregory, Administrator, and other officials of the National Highway Traffic Safety Administration of the Department of Transportation. Mr. Gregory testified as to the extent of odometer tampering since the 1972 statute was passed. In his prepared statement, Mr. Gregory stated that his Department received "hundreds of complaints" of odometer tampering by dealers and individuals, and that since investigatory ability was not provided by the 1972 Act, his Department had not been able to pursue the civil remedies available. Mr. Gregory described two types of

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*The Senate Report makes reference to hearings before the Senate Commerce Committee. The Congressional Information Service listings for the bills in question contain no indication of Senate Committee hearings, although the hearings before the House Committee on Interstate and Foreign Commerce for both the House bill (H.R. 8091) and the Senate bill (S. 1518) are listed.

complaints: those of multiple violations by organized operations and those by consumers about single violations. In the course of questioning by members of the House Committee, Mr. Gregory was asked to describe the nature of the organized operations. In turn, Mr. Gregory asked a staff member of his Department's Chief Counsel's office to respond, a Mr. Berndt. Mr. Berndt stated that there were "some large scale" operations and lots of "individual" tampering, and he did not provide much by way of actual statistics:

> MR. VAN DEERLIN: What would be the nature of organized tampering operations to which you refer in your testimony?
>
> MR. GREGORY: Since our Chief Counsel's office had the most direct exposure to that, I would like to ask Mr. Berndt to discuss some of the examples of this we have seen.
>
> MR. BERNDT: Well, we are very frustrated. We have had a lot of reports of both individual dealer type tampering and some large-scale operations. I can recall one where we had an informant that began to tell us about a large leasing company that was systematically rolling back the odometers and then selling those vehicles. Those vehicles were then sold by an auction company which was corporately related to the leasing company, then those vehicles were purchased by people from all over, dealers and so on. I think that is a typical example.

* * * *

MR. BERNDT: I think I was about to come forward with at least one more case of odometer tampering. If I may, Mr. Chairman, I would be pleased to provide for the record some other examples, if the committee so wishes, to get the flavor of what the problem is.

MR. VAN DEERLIN: I was interested in the idea of organized tampering. Is there a little Mafia at work here?

MR. BERNDT: I think we have evidence it is organized. Now any other implications, I think, would have to be only allegations on anybody's part.

In the State of Washington, as an example, two men were recently convicted on charges of grand larceny for sale of vehicles whose odometers had been altered.

Id. at 64.

As is apparent, although some operations might have been characterized as "organized," there was no evidence to show that odometer tampering was linked to interstate organized crime. With respect to the Washington example, Mr. Van Deerlin was quick to point out that Washington had its own odometer statute. Yet Mr. Berndt used the Washington prosecution as an illustration for the need of a federal criminal law:

MR. VAN DEERLIN: They had a State law.

MR. BERNDT: Evidence introduced at the trial demonstrated the men had been purchasing high mileage cars in California and transporting them to Washington for odometer resetting. It appears that certain persons in California were part of the tampering scheme

and were aware of the plans for the vehicle. In our judgment, a stronger Federal law would enable investigation of the interstate aspects of such operations and of course appropriate enforcement of the antiodometer tampering provisions. We have similar cases in States which have no odometer tampering statute. These States often act as a sort of collector of cars for tampering from surrounding States which do have odometer tampering laws. The State of Idaho seems to be a good example of this.

Id. at 64-65.

At the time of the House Hearings, not only did Washington have its own odometer statute, but a total of 36 states had statutes in effect. At the time of the original enactment in 1972, only 17 states had odometer statutes. Mr. Gregory, as part of his prepared statement said that his department, since the original enactment, had "urged the states to aid in securing compliance...including the adoption of laws prohibiting all efforts to defraud vehicle buyers through odometer tampering." Id. at 55.

At this writing there are only seven states which have made no provisions to alleviate odometer tampering (Idaho, Illinois, Indiana, Montana, Oklahoma, West Virginia and Wyoming). Forty-three states have statutes carrying fines and terms of imprisonment.

It would appear that the Department of Transportation was not only successful in increasing the number of states with odometer statutes and at the same time decreasing the need for a national policy, but it would appear that the states that had complained

to a federal agency of trafficking of vehicles into their borders for sale from states with odometer statutes had an easy remedy within their own police power--to enact their own odometer statutes. Furthermore, Mr. Berndt's example of the shipment into Washington, which had a statute, does not support his argument that a federal law was needed to prohibit shipment of vehicles into states without statutes. Mr. Berndt stated that his Department was seeking a "stronger Federal law [that] would enable investigation of the interstate aspects of such operations..." Id. at 64-65. But as enacted, §1984 exceeds his statement of need by reaching broadly to all aspects of such operations, intrastate as well as interstate.

A representative of the National Automobile Dealers Association, Reed B. Draper, Chairman, Governmental Relations Committee, testified that he felt the problem did not emanate from new car dealers due to State regulation, but rather wholesalers of used cars, many of which dealers, by nature, operate interstate:

> I can also assure you that NADA believes the violations by the independent used car dealers are minimal.
>
> The reason for that is most States have regulatory bodies where the dealers are bonded and the dealer is not an individual who is operating on one corner today and gone the next day. He is usually a well-respected member of his community. He is knowledgeable about odometer legislation.
>
> But the problem arises in that, taking Mr. McCollister's car, his 1973 Buick, chances are during the lifetime of that vehicle from the time it was manufactured until the time that it goes to the salvage yard, that car will be wholesaled, and by wholesaled I mean exactly this.

> We will take a car in trade which is a high mileage car. Because of odometer legislation dealers are not setting--rather new car dealers are not setting speedometers back; they will wholesale that vehicle to an automobile wholesaler. An automobile wholesaler is a very ethereal thing; it is very hard to locate them--and I am addressing my comments to why it was necessary to involve the U.S. Attorney General--he operates interstate, he will purchase cars in Michigan, one vehicle might end up in Nebraska or California, depending upon the market for that car.
>
> Id. at 74.

Therefore, the problem as presented to the House Committee was a narrow one. It is clear from the testimony presented that there was only a certain type of odometer tampering that was beyond the control of the state police power; wholesale dealers who operate in many states, and whose base of operations is difficult to pinpoint. The complaints about interstate shipment of used vehicles into states without odometer statutes could easily be remedied by enactment of statutes in those states. A statute could easily have been drafted to reach the described organized interstate trafficking within the commerce power by requiring a nexus to commerce, i.e., a proscription of odometer tampering on vehicles shipped into or received from interstate or foreign commerce.

Another justification for the need for federal criminal control over intrastate activities is when those activities are so commingled with or related to interstate activities that local activities "must be regulated if interstate commerce is to be effectively controlled." United States v. Lopez, 459 F.2d 949 (5 Cir. 1972), cert. denied

409 U.S. 878 (1972); United States v. Scales, 464 F.2d 371 (6 Cir. 1972); United States v. Darby, supra. Both Lopez and Scales challenged the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 841 (a)(1) on the basis that the statute exceeded the commerce power in that there was no requirement of allegation or proof that the particular activity involved in each individual case affected interstate commerce. Again, as in Perez and other cases reviewing criminal statutes without statutory nexus requirements, the legislative intent and purpose was scrutinized. In Lopez the court applied the two-tier test of rationality and reasonableness and determined that Congress had a rational basis for determining it was necessary to proscribe purely interstate instances of drug traffic in order to alleviate a national problem. The findings of Congress as to why all intrastate instances should be proscribed were explicit:

> ...Principal among these [findings and declarations] were the findings that intrastate incidents of the traffic in controlled substances, such as manufacture, local distributions and possession, had a substantial and direct effect on interstate commerce; that such intrastate incidents of the traffic in controlled substances swelled the interstate traffic in such substances; that it was impossible to distinguish between substances manufactured and distributed intrastate from those manufactured and distributed interstate and therefore, it was not feasible to distinguish between such substances in terms of controls; and that control of the intrastate incidents of traffic in controlled substances was essential to the control on interstate incidents of that traffic. Lopez, supra, at 952-953.

The Court also pointed out that the findings of Congress were based on "statistical reports and extensive testimony" as to the extent of drug traffic in the United States. Id. at 953. Relying on the implicit legislative intent and the holding in Perez, the Court held that the statute was within the commerce power.

In United States v. Burroughs, 564 F.2d 1111 (4 Cir. 1977), when faced with a statute that contained no statutory language requiring a nexus to commerce [18 U.S.C. §2511(1)(a)] the 4th Circuit Court of Appeals upheld the judgment of acquittal granted by the District Court. Although it did not reach the issue of the statute's constitutionality under the commerce clause, the Court analyzed the other subsections of 18 U.S.C. §2511 which did contain a nexus requirement. The Court rejected the government's contention that once Congress established a sufficient nexus to legislate, the nexus would be imputed to all sections of the statute. Relying on United States v. Bass, supra, the Court held that Congress had not "plainly and unmistakably" made the proscribed activity a federal crime "absent some demonstrated federal nexus." Id. at 1115 (emphasis original). In summary, the Court stated:

> ...In the instant case, the broad construction urged by the government would render purely local criminal conduct a matter of federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some federal nexus in each case, §2511(1) (a) would dramatically intrude upon traditional state criminal jurisdiction. Id. at 1116.

The Second Circuit was confronted with the issue of the sufficiency of the Federal nexus for conviction under the Travel Act (18 U.S.C. §1952) in United States v. Archer, 486 F.2d 670 (2 Cir. 1973). Although the court based its finding that the Federal nexus was insufficient since the Federal element was supplied by the government and did not reach the constitutional issue, it discussed the problem of expanding Federal jurisdiction in criminal matters: "...Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds..." Id. at 677. In his examination of the legislative history to determine Congress' intent as to the degree of nexus required, Judge Friendly made observations that are applicable to the issue presented herein. He was impressed with the breadth of the language of the text of the statute as compared to its title. For instance the title referred to a proscription of acts "in aid of racketerring enterprises," yet the textual definition of unlawful activities contained no such limitations. The same could be said of the statute under discussion. The 1976 version, which amendment included criminal sanctions, bears the title "Motor Vehicle Information and Costs Savings" and deals largely with improving fuel efficiency, bumper standards and diagnostic inspections, and although the purpose of the act as articulated when proposed to the Senate was to "promote competition in the production of safe motor vehicles..." the act contains a criminal provision reaching any instance of odometer tampering providing for up to one year of incarceration and/or a $50,000 fine. Judge Friendly's remarks concerning the legislative history of the Travel Act are equally applicable here:

> ...The legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted.
> Id. at 678.*

The Supreme Court also rejected an expansive reading of the Travel Act in Rewis v. United States, 401 U.S. 808 (1971) and issued a warning against the over-expansion of federal criminal jurisdiction based on the commerce power:

> Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulations, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would deter sensitive federal/state relationships, could overextend limited federal police resources, and might well produce situations in which geographic origins of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies...
> Id. at 812.

Such would be the situation in the instant case should the government argue a nexus to commerce on the basis that vehicles with tampered odometers might be sold to out-of-state customers. The purely intrastate

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*Judge Friendly recently reiterated his concern with the use of federal crime statutes to prosecute state offenses. United States v. Mennuti, et al, Slip. Op. 80-1174 (2 Cir. Jan. 9, 1981)

nature of the alleged rolling back of an odometer would be transformed into a federal crime simply because of the "geographic origin of customers, a matter of happenstance." Additionally, a governmental showing of a claimed nexus not required by the statute cannot cure a statute that exceeds the power of Congress and therefore is unconstitutional on its face.

As evidenced by the foregoing discussion of the investigation and records of Congress, there was no discussion of the ramifications of the broad reach of the statute, and no discussion showing that Congress had made an informed and rational determination that the congressional objective could not be met unless activities traditionally subject of the state police power were reached. Indeed, given the nature of the problem that Congress faced, and its goal to alleviate the interstate aspects of that problem, Congress could have met its objective quite simply by drafting a narrower statute containing a nexus. A statute of that nature would clearly have been within the bounds of the commerce power. The history and language of the findings and statute give no indication that Congress had faced the "serious questions and meant to affect the federal-state balance..." Bass, supra, at 350; also see, United States v. Mennuti, Slip. Op. 80-1174 (2 Cir. January 9, 1981).

There is no dispute that Congress has the power to reach purely local matters without requiring a nexus to commerce if there is a rational basis for its belief that the local incidences must be controlled in order to regulate a class of activities that affect commerce which cannot be effectuated without control of the intrastate aspects, and if Congress has chosen a reasonable means to effectuate that control. An examination

of those cases which upheld statutes without nexus requirements illustrates that Congress dealt head-on with the issue of whether it was necessary to reach local activities by conducting extensive investigation and discussion as to the nature of the enterprise they were attempting to alleviate. The record to support those determinations--i.e., with respect to the relationship of local activities and organized crime, the relationship of licensing of dealers to the national problem of illegal gun traffic, and the difficulties of controlling interstate drug traffic without reaching local operations--is extensive and specific. Additionally in each of the cases dealing with such expansive federal jurisdictions into intrastate activities, the Courts have recognized that Congress was dealing with a matter of national importance suitable for federal involvement. The few federal criminal statutes relying on the commerce power that do not require a nexus deal with those types of serious national concerns--organized crime, gun control, drug traffic-which are of such a deep and widespread nature that they reach the very essence of the quality of life of our nation as a whole. If odometer tampering is tantamount to those concerns and justifies the broad reach of federal law enforcement into an area, which by our fundamental and long-held principles of federalism has been reserved to the states, a major step toward the erosion of the delicate balance of federal-state power will be taken.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

THE PETITIONER

By Hubert J. Santos
A Member of the Bar
of the Supreme Court
of the United States

NO._____

In The

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM THIBADEAU
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

APPENDIX

APPENDIX (1)

OPINION OF UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT (October 7, 1980)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CLERK
DISTRICT COURT
HARTFORD, CONN.

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. H 80-29

WILLIAM THIBADEAU, :
PATRICK THIBADEAU and
NORMAN HARRIS :

RULING ON MOTION TO DISMISS

The defendants have moved to dismiss the information charging them with tampering with motor vehicle odometers, in violation of 15 U.S.C. §§ 1984 and 1986, on the grounds that: (1) those statutes were enacted in violation of the commerce clause, U.S. Const., art. I, § 8, cl. 3; and (2) the provision of 15 U.S.C. § 1990c for a fine of as much as $50,000 for a violation of 15 U.S.C. §§ 1984 or 1986 violates the Eighth Amendment's prohibition of "excessive fines." The court finds that the first argument is without merit and that the second contention is premature. Accordingly, the motion to dismiss is denied.

The defendants' commerce clause argument must be rejected, since Congress may legislate under that clause so long as there is a "rational basis for finding [the] regulatory scheme necessary to the protection of commerce." Katzenbach v. McClung, 379 U.S. 294, 304 (1964). The statutory findings embodied in 15 U.S.C. § 1981, as well as the legislative history from which the defendants

exhaustively quote in their brief, demonstrate that Congress had the requisite rational basis for proscribing odometer tampering. Moreover, Congress' determination that criminal, as well as civil, sanctions might be appropriate for the conduct with which the defendants are charged in this case may not be second-guessed by the court; a statute is not unconstitutional under the commerce clause merely because Congress "could have pursued other methods" to achieve the permissible goals of the legislation. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

The defendants' claim that the maximum fine provided in 15 U.S.C. § 1990c violates the Eighth Amendment is premature. The constitutionality of the penalties which a court may prescribe after conviction is not ripe for judicial determination where, as here, the defendants have not been convicted, much less sentenced. See Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 104 (1964); United States v. Bradford, Crim. No. H 80-1, at 1-2 (D. Conn. June 10, 1980)(alternative holding); United States v. Williams, Crim. No. H 78-41, at 7-8 (D. Conn. Jan. 11, 1979) (Blumenfeld, J.) (alternative holding); United States v. Maiden, 355 F. Supp. 743, 749 (D. Conn. 1973) (Newman, J.) (Alternative holding); United States v. Miller, 249 F. Supp. 59, 64-65 (S.D.N.Y. 1965), aff'd, 367 F. 2d 72 (2d Cir. 1966), cert. denied, 386 U.S. 911 (1967). Accordingly, the court denies this part of the motion without reaching its merits.

For the foregoing reasons, the motion to dismiss the information is denied.

It is so ordered.

/s/ José A. Cabranes
José A. Cabranes

APPENDIX (2)

OPINION OF THE COURT OF APPEALS FOR THE SECOND COURT

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of May, one thousand nine hundred and eighty-one.

Present: HONORABLE IRVING R. KAUFMAN,
HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,

Circuit Judges.

United States Court of Appeals - FILED
MAY 15, 1981
A. DANIEL FUSARO,
CLERK - SECOND
CIRCUIT

UNITED STATES OF AMERICA, Appellee,	81-1030
v.	81-1031
	81-1032
PATRICK THIBADEAU, WILLIAM THIBADEAU and NORMAN HARRIS, Appellants.	

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed.

1. The penal statutes challenged are an appropriate exercise of Congress's Commerce Power. The Congressional findings set forth in 15 U.S.C. § 1981 and the legislative history to 15 U.S.C. §§ 1984-1986 indicate that Congress had a rational basis for concluding that odometer tampering affected interstate commerce and that the intrastate manifestations of this conduct fell within a class of activities that Congress had the power to prohibit. See Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Furthermore, the means Congress adopted to deter this conduct were reasonable, since its earlier reliance on civil sanctions had proved to be unfounded. See Heart of Atlanta Motel, Inc., supra.

2. Sections 1984-1986 may also be upheld on the basis of Congress's undoubted authority to protect the instrumentalities of interstate commerce. See Perez. supra, 402 U.S. at 150; Houston, East and West Texas Railway Co. v. United States, [The Shreveport Rate Case], 234 U.S. 342 (1914).

3. Our application of the three factors listed in Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979), indicates that the fines imposed on appellants were not excessive and, accordingly, did not violate the Eighth Amendment.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN

/s/ Walter R. Mansfield
WALTER R. MANSFIELD

/s/ James L. Oakes
JAMES L. OAKES

Circuit Judges.